92-1860

No. _____

Supreme Court, U.S.
FILED
MAY 4 - 1993
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
October Term, 1992

DONALD WAYNE DOUGLAS AND DOUGLAS DRILLING, INC.,
Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a decision of a Texas Court of Civil Appeals, decided at a time when holdings of the Texas Supreme Court with respect to res judicata were difficult to reconcile, constitutes a judicially engrafted exception to Rule 13(a), Federal Rules of Civil Procedure, in transgression of the overriding purpose of the Rules Enabling Act, 28 U.S.C. 2072, to provide a uniform system of practice and procedure in the federal judicial trial system.

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IN THE
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OCTOBER TERM, 1992

DONALD WAYNE DOUGLAS AND
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FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Donald Wayne Douglas and Douglas Drilling, Inc. (jointly,"Douglas"), respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit denying Petition for Rehearing entered in this proceeding on February 3, 1993, and the opinion of that court filed December 30, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 979 F.2d 1128, is reproduced in its entirety as Appendix A.

The order reviewed below, of the United States District Court for the Northern District of Texas, issued without opinion and not reported, is reproduced in its entirety as Appendix B.

AFFILIATES OF DOUGLAS DRILLING, INC

Petitioners advise the Court that Petitioner Douglas Drilling, Inc. does not have any parent corporation, nor does it own any subsidiary corporations.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit denying Petition for Rehearing was entered on February 3, 1993. The opinion of that Court was filed December 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

DECISION AND RULE INVOLVED

Rule 13(a), Federal Rules of Civil Procedure, and the decision of *Kaspar v. Keller,* 466 S.W.2d 326 (Tex. Civ. App.--Waco 1971, writ ref'd n.r.e), which created an alleged "substantive right".

STATEMENT

This action was brought by Petitioners, Donald W. Douglas ("Douglas") and Douglas Drilling, Inc. ("DDI") in the 42nd District Court of Taylor County, Texas, against NCNB Texas National Bank ("NCNB") on March 25, 1991 ("Douglas II"), for declaratory judgment and for construction of demands asserted against Douglas and DDI by NCNB regarding two promissory notes given by Douglas and DDI to First Republic Bank Abilene, N.A.

("FRBA") prior to the failure of such bank and for declaration that Douglas and DDI had no obligation under such notes due to failure of FRBA, and its successors, to assert compulsory counterclaim upon such notes in prior litigation between such parties ("Douglas I").

On December 13, 1991, FDIC intervened in the state action, claiming Douglas' and DDI's notes had been assigned to Federal Deposit Insurance Corporation ("FDIC') by NCNB; and, thereafter, this cause was removed to Federal Court.

After removed, FDIC filed a motion for leave to file an amended counterclaim. Douglas and DDI filed opposition to such motion and requested that the District Court treat such response as a motion for summary judgment and dispose of the matter under Rule 56, Federal Rules of Civil Procedure.

On February 27, 1992, FDIC filed a motion for summary judgment, which the District Court granted.

The essential facts regarding the prior litigation between the parties is not disputed. DDI executed a promissory note (herein the "First Note") on October 2, 1987, payable in monthly installments, with maturity on April 2, 1988, to the order of FRBA in the principal sum of $401,776.45. DDI did not make the monthly payment due on the First Note on January 2, 1988; and the First Note went into default on that date and remained in default. Douglas also executed a promissory note (herein the "Second Note") dated October 2, 1987, payable in monthly installments, with maturity on April 2, 1988, to the order of FRBA in the principal sum of $192,015.06. Douglas did not make the monthly payment due on the Second Note on January 2, 1988; and the Second Note went into default on

that date and remained in default.

On or about April 11, 1988, after both notes had matured and were in default, Douglas and DDI filed Plaintiff's Original Petition in Cause No. 18,188-B in the 104th District Court of Taylor County, Texas, styled *Donald Douglas and Douglas Drilling. Inc.. Plaintiffs v. First Republic Bank of Abilene. N.A. et al* (Douglas I). The lender-borrower relationship that existed between FRBA and Douglas and DDI arising out of the two notes was the foundation of claims made in the original petition filed in state court in Douglas I.

FRBA removed Cause No. 18,188-B to the United States District Court for the Northern District of Texas, Abilene Division, on May 5, 1988; and it became Cause No. CA-1-88-0061. FRBA filed its original answer to such petition on May 9, 1988. In ¶8 of its answer, FRBA admitted that Douglas and DDI had executed one or more promissory notes payable to FRBA; and in ¶27 of said answer, FRBA admitted it had notified Douglas and DDI by mail of indebtedness due FRBA by Douglas and DDI.

FRBA did not file a counterclaim against either Douglas or DDI while their action against FRBA was pending in either state or federal court. On July 29, 1988, FRBA failed; and FDIC was appointed Receiver of said bank and, thereafter, intervened in Cause No. 1-88 0061 as the real party in interest. During the entire time Douglas I was pending in the District Court (a period of almost 24 months), the two notes owing to FRBA by Douglas and DDI were in default; and neither FRBA nor FDIC made any effort to collect the sum due to FRBA on the notes. On March 12, 1990, Douglas and DDI moved to dismiss said Cause No. 1-88 0061. On March 13, 1990, the District Court granted such motion and dismissed Cause No. 1-88

0061 with prejudice. The March 13, 1990 dismissal order was a final order rendered by a court of competent jurisdiction; and no appeal was made.

After the Court dismissed Cause No. 1-88 0061, FDIC filed a document entitled Motion to Reconsider Motion to Dismiss, Or Alternatively, to Correct or Modify Order of Dismissal and, in such, protested that such dismissal with prejudice could act to bar any future claims of NCNB/FDIC on the notes from Douglas and DDI because of failure of NCNB/FDIC to file a compulsory counterclaim in said Cause No. CA1-88 0061. On April 17, 1990, the District Court denied such motion to reconsider.

Thereafter, NCNB made demands against Douglas and DDI on the two notes, which demands motivated the filing of Cause No. 42,466 A against NCNB (Douglas II) for declaratory judgment in the 42nd District Court of Taylor County, Texas, which became this action.

REASONS FOR GRANTING THE WRIT

I. A Writ of Certiorari Should Be Granted In This Appeal To Resolve The Question Presented Which Concerns A Judicially Engrafted Exception To Rule 13(a), Federal Rules Of Civil Procedure, In Transgression Of The Overriding Purpose Of The Rules Enabling Act, 28 U.S.C. 2072, To Provide A Uniform System of Practice And Procedure In The Federal Judicial Trial System.

The decision below is in direct conflict with decisions of this Court, with decisions of the Court below, and with decisions of the Courts of Appeal for the Third, Fourth, Ninth, and Tenth Circuits regarding the matter of "substantive rights" under the Rules Enabling Act, 28

U.S.C. 2072, and Rules of Civil Procedure promulgated by this Court.

II. The Court Below, Substantive Rights, Compulsory Counterclaims, and Res Judicata Under Rule 13(a), Federal Rules of Civil Procedure.

The Court below recognized that under rule 13(a), FRBA's debt collection claims against DDI and Douglas might very well constitute compulsory counterclaims under the decisions of that Court in *Plant v. Blazer Financial Services,* 598 F.2d 1357, 1363-65 (5th Cir. 1979), which held that a state debt counterclaim in a federal truth-in-lending action was compulsory under Fed. R. Civ. P. 13(a) (979 F.2d at 1129). However, the Court below did not apply such federal rule because of its belief that application of such rule in this action would violate a substantive right given to FDIC under the doctrine of *Kaspar v. Keller.* 466 S.W.2d 326, 329 (Tex. Civ. App.--Waco 1971, writ ref'd n.r.e.), which held that under Texas law, when a borrower files an action challenging the validity of a secured debt, the Texas compulsory counterclaim rule, Tex. R. Civ. P. 97(a), did not require the secured party to counterclaim to collect on the debt if the lender had a contractual right under a deed of trust to pursue a nonjudicial foreclosure.

The Rules Enabling Act, 28 U.S.C. §2072, does provide that federal rules shall not abridge, enlarge or modify any substantive right; however, Congress did not define the meaning of "substantive right", nor has the Court below or this Court done so. The decision in *Kaspar* constitutes a judicially engrafted exception to said rule 13(a). If the doctrine of *Kaspar* is deemed to constitute a "substantive right" as such term is used in .the Rules Enabling Act, and thus defeat the application of said rule

13(a) to this action, the overriding purpose of the Rules Enabling Act, which is to provide a uniform system of practice and procedure in federal courts, will be defeated by a single act of a state appellate judge.

It is most difficult for Douglas and DDI to comprehend what "substantive right" FDIC could lose by the application of rule 13(a) to this appeal. Douglas I was on the docket of the U.S. District Court from April 11, 1988, until March 12, 1990 (a period of almost two whole years), without the defendant in that cause filing a counterclaim which was clearly compulsory under Rule 13(a). The court below actually ignores procedural safeguards granted to Douglas and DDI under Rule 13(a), and rewards FDIC for ignoring Rule 13(a) and sitting on the sidelines in Douglas I. At any time while Douglas I was pending, FDIC and its predecessors could have exercised their rights under the security agreement to have a private or public sale of the collateral for the notes. The filing of the first case did not prevent the sale of the collateral. FDIC's predecessors elected *not* to sell such collateral. Douglas and DDI are the parties whose rights have been infringed because FDIC's predecessors did *nothing*. Douglas and DDI have followed the rules; FDIC and its predecessors did not. Yet, the Court below rewards the party sitting on the sidelines and gives FDIC two bites of the apple.

III. Matter of Conflicts With Decisions of This Court.

In *Baltimore S. S. Co. v. Phillips,* 274 U.S. 316, 319-320, 47 S. Ct. 600, 602, 71 LEd. 1069 (1927), this Court stated the rules governing the application of the doctrine of res judicata:

> The effect of a judgment or decree as res judicata depends upon whether the second action or suit is upon

> the same or a different cause of action. If upon the same cause of action, the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every of recovery which might have been presented....
>
> > "A party . . . is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible."

In *Southern Construction Co. v. Pickard,* 371 U.S. 57, 83 S.Ct. 108, 110, 9 L.Ed.2d 31 (1962), this Court considered the purpose of Rule 13(a) and stated:

> The requirement that counterclaims arising out of the same transaction or occurrence as the opposing party's claim "shall" be stated in the pleadings was designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters. The Rule was particularly directed against one who failed to assert a counterclaim in one action and then instituted a second action in which that counterclaim became the basis of the complaint.

The principles established by this Court under *Phillips, Pickard,* and in the promulgation of Rule 13(a) have been violated by FDIC in this action; yet the court below has rewarded FDIC for doing nothing, in direct disregard for the compulsory counterclaim requirements of

Rule 13(a). In *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 101 S.Ct. 2424, 2428-29, 69 L Ed. 103 (1981), this Court stated that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action and stated:

> ... The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata." ... The Court of Appeals' reliance on "public policy" is similarly misplaced. This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." ... We have stressed that "[the] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace', which should be cordially regarded and enforced by the courts...." (citations omitted)

In *Montana v. U.S.,* 440 U.S. 147, 99 S.Ct. 970, 973, 59 L. Ed. 2d 210 (1979), this Court stated that the application of the doctrine of res judicata was central to the purpose for which civil courts have been established, being the conclusive resolution of disputes within their jurisdiction and held (99 S.Ct. at 973-974):

> ... To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation

> attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

The public policy for an end to litigation enunciated in ***Moitie*** and conservation of judicial resources policy established by this Court in *Montana* have been violated and ignored by FDIC. This matter should have been resolved in Douglas I. It should not have been necessary to file a Douglas II.

In *Hanna v. Plumer* 380 U.S. 460, 85 S.Ct. 1136, 1145, 14 L.Ed.2d 8 (1965), this Court held that "... The Erie rule has never been invoked to void a Federal rule" (85 S.Ct. at 1143) and stated (85 S.Ct. at 1145):

> Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules. Cf Herron v. Southern Pacific Co., 283 U.S. 91, 51 S.Ct. 388, 75 LEd. 857. "When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic." Guaranty Trust Co. of New York v. York, supra, 326 U.S. at 108, 65 S.Ct. at 1469; Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555, 69 S.Ct. 1221, 1229. Thus, though a court, in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts, Sibbach v. Wilson & Co., supra, 312 U.S. at 13-14, 61 S.Ct. at 426-427, it cannot be forgotten that

> the Erie rule, and the guidelines suggested in York, were created to serve another purpose altogether. To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act. Rule- 4(d)(1) is valid and controls the instant case.

In *Byrd v. Blue Ridge Rural Electric Co-Op,* 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958), this Court, in deciding whether a federal court should follow a state practice on jury issues, recognized a possible conflict between the Erie doctrine and an essential characteristic of the federal system regarding functions between judge and jury and held that the Rules prevailed and the federal court should not follow the state rule.

In *Sibbach v. Wilson & Co.,* 312 U.S. 1, 61 S.Ct. 422, 85 LEd. 479 (1941), this Court construed a claim of substantive right and the Enabling Act in an action where a plaintiff, suing in federal court for damages for personal injuries, had been ordered pursuant to Rule 35 to submit to a physical examination by court appointed doctors. Plaintiff resisted the order, claiming Rule 35's authorization of physical examinations abridged substantive rights and exceeded the statutory grant of power embodied in the Enabling Act. The court rejected plaintiff's argument and upheld Rule 35 as a valid exercise of rule making power under the Act. The majority of the court, in consideration of plaintiff's claim that she should be free from physical examination during civil litigation, believed such claim to be perhaps "important" or "substantial", but not a "substantive right". Unfortunately, the court did not go forward to define the term "substantive right".

The decision of the court below adopts the doctrine of *Kaspar*, creating a "substantive right" for a lender who sits idly by for two years and does nothing, in complete violation of the federal compulsory counterclaim rule and is in conflict with this Court's holdings in *Hanna, Byrd,* and *Sibbach*. The doctrine of *Kaspar* does *not* create a substantive right. As in *Sibbach.* a lender's right to choose remedies may be important; but after two years of that lender doing nothing, such right is not a "substantive right".

IV. Matter of Conflicts With Other Decisions Of The Court Below.

The court below had previously protected the overall goal of a comprehensive system of rules of procedure in the federal courts system. The decision appealed from is a departure for the Fifth Circuit and is in conflict with its other decisions.

In *Affholder. Inc. v. Southern Rock. Inc.*, 746 F.2d 305, 310 (5th Cir. 1984), the court stated:

> ... As Professors Wright, Miller, and Cooper comment, "whatever the appropriate construction of 'abridge, enlarge or modify' is, it presumably must accommodate the goal of a comprehensive system of procedure and allow for such impingements of substantive rights as are reasonably incidental to significant procedural objectives." The Rules Enabling Act and Hanna require us to give the Federal Rule deference and to presume both its validity and applicability until its invalidity is demonstrated.

In *Lumbermen's Mutual Casualty Co. v. Wright* 322

F.2d 759, 762 (5th Cir. 1963), the court considered an appeal where a Louisiana statute conflicted with Rule 41 and held:

> Rule 41 specifically regulates the dismissal of actions. The rule is essentially a matter of federal courts administering the cases before them, and has no necessary relation to a state system of limitations. As long as there is still the breath of life in a suit kept alive by the federal courts, it strikes us as unseemly to allow the state to kill the case. It is a different story when the district judge dismisses an action and it is no longer sheltered within a federal haven.... If we should require Rule 41(b) to yield to Article 3519, the discretionary powers of a federal district court would be seriously curtailed.

The court also stated in *Lumbermen's.* 322 F.2d at 764:

> One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules. This is especially true of matters which relate to the administration of legal proceedings, an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules.... the Federal System is an independent system for administering justice to litigants who properly invoke its jurisdiction and that federal courts must be able to prescribe rules for the administration of cases to be tried before them.

In *Plant v. Blazer Financial Services Inc. of Ga.,* 598 F.2d 1357, 1364 (5th Cir.1979), the court stated that "... one of the purposes of the compulsory counterclaim rule is to provide complete relief to the defendant who has been brought involuntarily into the federal court".

In *Aerojet-General Corporation v. Askew,* 511 F.2d 710, 716 (5th Cir. 1975), this Court determined that Rule 13(a) prevailed over a Florida law of res judicata and stated:

> Considering this case solely in its diversity aspect also leads us to the conclusion that the federal law of res judicata should be applied. The importance of preserving the integrity of federal court judgments cannot be overemphasized--out of respect for the federal courts and for the policy of bringing litigation conclusively to an end. If state courts could eradicate the force and effect of federal court judgments through supervening interpretations of the state law of res judicata, federal courts would not be a reliable forum for final adjudication of a diversity litigant's claims.

In other decisions, the court below has upheld the validity of the Rules when in conflict with state court rulings, statutes, and state procedural rules. The court below has, in the decision appealed from, departed from such course of action and applied the doctrine of *Kaspar* to protect FDIC after it sat on the sidelines for two years in Douglas I and did nothing.

V. Matter of Conflicts With Decisions Of Other Federal Courts of Appeal.

The decision of the Court below in this appeal conflicts with holdings of the Third, Fourth, Ninth, and Tenth Circuit Courts of the United States Courts of Appeal.

In *TPO. Inc. v. FDIC.* 487 F.2d 131, 133 (3rd Cir. 1973), the court held Rule 13(a) applicable in an appeal wherein a New York statute conflicted with the compulsory counterclaim rule and stated:

> While New York practice may not permit the filing of a counterclaim in the special procedure utilized by the plaintiff originally, the state rules became inoperative when the litigation was removed to the district court. The Federal Rules of Civil Procedure then became applicable, and the requirement for filing a compulsory counterclaim became effective. See F.R.C.P. 81(c); 13(a)

In *Tolson v. Hodge,* 411 F.2d 123, 127 (4th Cir. 1969), the court stated:

> ... Granted initial jurisdiction, this strong policy of uniformity, and the equally strong policy of Rule 13(a) to prevent a multiplicity of litigation arising out of a single transaction or occurrence except when full justice cannot be done, would be significantly undermined if, after commencement of suit, Rule 13(a) were subordinated ... once a district court properly exercises jurisdiction to determine a cause of action, such procedural matters as the assertion of counterclaims should be governed by the specific Federal Rules pertaining thereto without further reference to state law.

The Ninth Circuit in *Olympic Sports Prod.. Inc. v. Universal Athletic Sales Co.* 760 F.2d 910 (9th Cir. 1985), reviewed an appeal where both state and federal laws covered counterclaim procedures utilized in a federal diversity case and examined the Rules Enabling Act and discussed *Hanna* and other decisions of the Supreme Court. After doing so, the court held the federal rule controlled the case-not a state statute.

The Tenth Circuit in *Doelle v. Mountain States Telephone and Telegraph.* 872 F.2d 942, 945 (l0th Cir. 1989), affirmed the district court's decision to allow the

filing of a compulsory counterclaim, although such decision was challenged by a Utah statute prohibiting a counterclaim in condemnation proceedings, by holding that under *Hanna*, the assumption is that the federal counterclaim rule will apply.

The court reasoned (872 F.2d at 945) that:

> In the case before us, the district court permitted the defendant's counterclaim under Fed.R.Civ.P. 13. The issue is thus whether federal or state law governs counterclaim procedures in a federal diversity case. See Erie RR v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). We hold that the Peterson rule, even if broadly construed to bar suit in the Utah courts, would not bar the defendant's counterclaim in the federal district court.
>
> If both a state rule and a federal rule cover the same situation, the analysis in Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 LEd.2d 8 (1965) applies.
>
> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

The Utah statute considered in *Doelle* was a legislative declaration of the public policy of the State of Utah establishing rights for citizens of Utah; yet, the Tenth Circuit held that Rule 13(a) must prevail over the Utah statute. Kaspar--not a statute--was the basis of the decision

in the court below. This is clearly erroneous. Kaspar has been cited only three times by Texas courts [*El Paso Development Co. v. Berryman,* 729 S.W.2d 883, 888 (Tex. App.-- Corpus Christi 1987, no writ)--cited re matter of accrual of interest on note; *Stille v. Colborn,* 740 S.W.2d 42, 44 (Tex. App. -San Antonio 1987, writ denied)--cited re matter of compulsory counterclaim; and *Metropolitan Life Ins. Co. v. La Mansion Hotels,* 762 S.W.2d 646, 653 (Tex. App.--San Antonio 1989, *no writ*)--cited on matter of interest accrual on note]. *Kaspar* was also cited once by a U.S. Bankruptcy Court in *In Re Phillips,* 124 B.R. 712, 717-18 (Bankr. W.D. Tex. 1991)--cited re matter of compulsory counterclaim. The only federal appeals court to cite *Kaspar* has been the Fifth Circuit in *Thurman v. FDIC.* 889 F.2d 1441, 1444-45 (5th Cir. 1989)-cited re matter of compulsory counterclaim.

VI. The Question is Substantial And The Decision Below Is Incorrect.

Argument

Rule 13(a) is also a valid exercise of rulemaking power under the Rules Enabling Act, and the Court below erred in deciding that the doctrine of *Kaspar* should prevail over such Rule. The doctrine of *Kaspar* must not prevail over Rule 13(a) promulgated by this Court under Congressional authorization to prescribe uniform rules to govern the practice and procedure of the federal courts.

The purpose of the Federal Rules of Civil Procedure is set forth in Rule 1, which states the rules shall be construed to secure the just, speedy and inexpensive determination of every action. There is probably no provision in the Federal Rules more important than this mandate. To permit the doctrine of *Kaspar* to prevail over Rule 13(a) invites other state courts to enlarge exceptions to

Rule 13(a) and frustrate basic rule-making powers of this Court.

Kaspar was decided during a period of time when the Texas Supreme Court was having difficulty in reconciling its res judicata holdings. In September of 1992, the Texas Supreme Court, in *Barr v. RTC*. 837 S.W.2d 627 (Tex. 1992), invalidated *Kaspar* by holding that any cause of action that arises out of the same facts should be litigated in the same lawsuit. The court stated (837 S.W.2d at 629-630):

> ... our holdings with respect to res judicata are difficult to reconcile ... Without any objective standard, each case is decided ad hoc, and therefore the doctrine is "inherently unpredictable" and "affords little basis for consistency and formulation of precedent".

The court then announced that Texas would follow the "transactional" approach to res judicata and stated (837 S.W.2d at 631):

> We conclude that the transactional approach to claims preclusion of the Restatement effectuates the policy of res judicata with no more hardship than encountered under rule 97(a) of the rules of civil procedure. Modern rules of procedure obviate the need to give parties two bites at the apple, as was done in Griffin, to ensure that a claim receives full adjudication. Discovery should put a claimant on notice of any need for alternative pleading. Moreover, if success on one theory becomes doubtful because of developments during trial, a party is free to seek a trial amendment.
>
> We reaffirm the "transactional" approach to res judicata. A subsequent suit will be barred if it arises out of the same subject matter of a previous suit and

> which through the exercise of diligence, could have been litigated in a prior suit. For these reasons, the judgment of the court of appeals is reversed and that of the trial court is affirmed.

In *Barr,* the Texas Supreme Court overruled its holding in *Griffin v. Holiday Inns of America.* 496 S.W.2d 535 (Tex. 1973), which held that a take nothing judgment in a suit on contract for services and materials did not preclude a subsequent suit for quantum meruit. *Griffin* and *Kaspar* were both decided during the period in which, as stated in *Barr,* the Supreme Court was having difficulty in reconciling its res judicata holdings. Under the "transactional" test announced in *Barr,* the Waco Court of Civil Appeals would have decided *Kaspar* differently. The Supreme Court of Texas would now reverse *Kaspar,* which gave the parties two bites at the apple, as does the decision of the Court below. After *Barr,* the holding in *Kaspar* is no longer-valid procedure in Texas.

The decision below must not stand. Neither this Court nor Congress has defined the term "substantive right" as referred to in the *Rules Enabling Act,* and the *Kaspar* doctrine should not be held to establish a "substantive right" under such Act. This Court, the court below, and other Circuit Courts have consistently held that the Rules should prevail over conflicting state decisions, statutes, and rules. This Court should not approve *Kaspar's* judicially engrafted exception to Rule 13(a) and should not reward any party sitting on the sidelines and ignoring such Rule as Appellee and its predecessors have done. The Texas Supreme Court, after *Barr.* would not so reward Appellee as the court below has done. The decision below, if allowed to stand, will inject unforeseen dimensions into the matter of state conflicts with the Rules as well as into the overriding purpose of the Rules Enabling Act and of *Hanna* to provide a uniform system of practice and procedure in federal

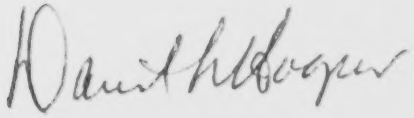
courts. Rule 13(a) was particularly directed to parties such as FDIC and its predecessors who fail to assert a counterclaim in one action and then do so in a second action.

Conclusion

For the foregoing reasons, this Petition for Writ of Cerhorari should be granted.

DATED: May 4, 1993.

Respectfully submitted,



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Counsel for Petitioners

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1572

DONALD WAYNE DOUGLAS and
DOUGLAS DRILLING, INC.,

Plaintiffs-Counter
Defendants-Appellants,

versus

NCNB TEXAS NATIONAL BANK, ETC.

Defendants-Appellee,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION,

Counter Plaintiff-Appellee.

Appeal from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING

(February 3, 1993)

Before REAVLEY, DAVIS and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1572
Summary Calendar

D.C. Docket No. 1:91-DV-136

DONALD WAYNE DOUGLAS and DOUGLAS DRILLING INC.

Plaintiffs-Counter Defendants-Appellants,

versus

NCNB TEXAS NATIONAL BANK, Etc.,

Defendant-Appellee,

FEDERAL DEPOSIT INSURANCE CORPORATION,

Counter Plaintiff-Appellee.

Appeal from the United States District Court for the Northern District of Texas

Before REAVLEY, DAVIS and DeMOSS, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on

file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-counter defendants-appellants pay to defendant-appellee and counter plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

December 30, 1992
A true copy
Test
Clerk, U.S. Court of Appeals, Fifth Circuit

By_____
Deputy Feb. 16, 1993

New Orleans, Louisiana

ISSUED AS MANDATE: Feb. 16, 1993

Donald Wayne DOUGLAS and Douglas Drilling, Inc., Plaintiffs-Counter Defendants-Appellants,

v.

NCNB TEXAS NATIONAL BANK, Etc., Defendant-Appellee,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, Counter Plaintiff-Appellee.

No. 92-1572
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Dec. 30, 1992.

Borrowers brought state court action against lender to recover for prime rate fraud. Action was removed, and secured lender filed answer, but no counterclaim on overdue notes. After lender was declared insolvent, Federal Deposit Insurance Corporation (FDIC) was appointed receiver and became assignee of notes. FDIC then sought to collect on notes. The United States District Court for the Northern District of Texas, Sam Ray Cummings, J., entered summary judgment in favor of FDIC. Borrowers appealed. The Court of Appeals, Reavley, Circuit Judge, held that federal rule on compulsory counterclaim did not apply when lender filed answer, but no counter claim.

Affirmed.

1. Federal Civil Procedure 775

Federal rule on compulsory counterclaim would abridge secured lender's substantive rights under Texas law to elect judicial or nonjudicial foreclosure, would enlarge borrowers' substantive rights, and, therefore, did not apply in borrowers' action alleging prime rate fraud, whether or not lender had deed of trust; thus, lender's failure to file counterclaim did not bar action by Federal Deposit Insurance Corporation (FDIC) to collect on notes as assignee. Fed. Rules Civ. Proc.Rule 13(a), 28 U.S.C.A; 28 U.S.C.A. § 2072.

2. Federal Courts 373

As general rule, once state court action is removed to federal court, it is governed by federal, rather than state, procedure rules.

3. Federal Civil Procedure 31

Court must not apply Federal Rule of Civil Procedure if application violates either Constitution or Rules Enabling Act. 28 U.S.C.A. § 2072.

4. Secured Transactions 223

Under Texas law, lenders have substantive right to elect judicial or nonjudicial foreclosure in event of default, and debtors have no right to force lender to pursue judicial foreclosure.

Appeal from the United States District Court for the Northern District of Texas.

Before REAVLEY, DAVIS and DeMoss, Circuit

Judges.

REAVLEY, Circuit Judge:

This appeal involves two promissory notes, one made by Douglas Drilling, Inc. (DDI) and the other made by Donald W. Douglas.

Federal Deposit Insurance Corporation, in its corporate capacity (FDIC/corp.), is the present holder of the notes, and it seeks (1) to recover amounts due on the notes and (2) an order requiring DDI to turn over collateral. DDI and Douglas contend that FDIC/corp. cannot collect on the notes because First Republic Bank Abilene, N.A. (FRBA), a prior holder of the notes, lost its right to collect on the overdue notes in prior litigation. DDI and Douglas contend that the compulsory counterclaim rule bars any action by FDIC/corp. to collect on the notes. The district court granted summary judgment in favor of FDIC/corp. on grounds that the counterclaim rule did not bar FDIC/corp. from collecting on the note and foreclosing on the collateral. We affirm.

I. BACKGROUND

On October 2, 1987, DDI and Douglas each executed a promissory note in favor of FRBA. The DDI note was secured by a security interest in personal property, and the Douglas note indicated that it was secured by a deed of trust in a mineral lease 1 and 1,000 shares of DDI stock. On January 2, 1988, both Douglas and DDI defaulted on their loans.

---

1. In his reply brief, Douglas asserts that his loan was never secured by a deed of trust. He contends that the deed of trust that is referred to in his note was released prior to the loan transaction with FRBA. Douglas, however, presented no evidence of this release in the district

court.

On April 11, 1988, after both notes had matured and were in default, DDI and Douglas filed a class action in Texas state court against FRBA (Class Action). The Class Action alleged that FRBA had committed "prime rate fraud" by charging interest on the basis of its "published" prime rate rather than its alleged "actual" prime rate. The Class Action was removed to federal court to be consolidated with similar class actions against FRBA. FRBA then filed its answer but filed no counterclaims on the overdue notes. In July 1988, FRBA was declared insolvent, the FDIC was appointed receiver, and NCNB acquired FRBA's assets, including the two notes. The Class Action continued against FDIC/receiver. (NCNB was never made a party to the Class Action.) On March 12, 1990, DDI and Douglas filed a motion to dismiss and the court dismissed the Class Action with prejudice. NCNB, on November 30, 1990, assigned the two notes to FDIC/corp., the current holder of the notes.

II. DISCUSSION

[1] DDI and Douglas contend that FDIC/corp.'s claims on the notes were compulsory claims that should have been raised by FRBA, FDIC/corp.'s predecessor-in-interest, in the Class Action. They assert that the compulsory counterclaim rule bars FDIC/corp.'s instant action on the notes. The narrow issue in this appeal is whether FRBA was required to raise its state-law collection claims in the Class Action.

[2,3] As a general rule, once a state court action is removed to federal court, it is governed by federal, rather that state, procedure rules. Fed.R.Civ.P. 13(a) provides that a counterclaim is compulsory if it arises out of the transaction or occurrence that is the subject matter of the

plaintiff's collection claims against DDI and Douglas might very well constitute compulsory counterclaims. *See Plant v. Blazer Fin. Services*, 598 F.2d 1357, 1363-65 (5th Cir.1979) (holding that a state debt counterclaim in a federal truth-in-lending action is compulsory under Fed. R.Civ.P. 13(a)). *But see id.* at 1362 n. 8 (noting that the ramifications of its decision on class action cases was not before the court). However, this court must not apply a federal rule of civil procedure if application of the rule violates either the Constitution or the Rules Enabling Act. *See Hanna v. Plumer*, 380 U.S. 460, 470-73, 85 S.Ct. 1136, 1143-45, 14 L.Ed.2. 8 (1965); *Weems v. McCloud*, 619 F.2d 1081, 1097-98 n. 38 (5th Cir.1980). The Rules Enabling Act provides that the federal rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072.[2]

Under Texas law, when a borrower files an action challenging the validity of a secured debt, the state's compulsory counterclaim rule, Tex.R.Civ.P. 97(a), does not require the secured party to counterclaim to collect on the debt if the creditor has a contractual right to pursue a nonjudicial foreclosure. *Kaspar v. Keller,* 466 S.W.2d 326, 329 (tex. Civ.App.-Waco 1971, writ ref'd n.r.e.); *see also Thurman v. Federal Deposit Ins. Corp.*, 889 F.2d 1441, 1444-45 (5th Cir.1989) (applying the *Kaspar* rule); *In re Phillips*, 124 B.R. 712, 717-18 & n. 11 (Banks.W.D.Tex. 1991) (same). The *Kaspar* court reasoned that lenders ordinarily have various judicial and nonjudicial remedies available on an overdue note and that a borrower should not be able to force its lender to elect judicial foreclosure by

---

[2]In *Burlington N.R.R. v. Woods*, 480 U.S. 1, 107 S.Ct. 967, 94 L.Ed.2d 1 (1987), the Court explained that federal rules that "*incidentally* affect litigants' substantive rights do not violate [the Enabling Act] if reasonably necessary to maintain the integrity of that system of rules." *Id.* at 5, 107 S.Ct. at 970 (emphasis added).

merely filing an action challenging the validity of a note. *See Kaspar*, 466 S.W.2d at 328029; *Thurman*, 889 F.2d at 1445. The *Kaspar* court noted:

> [T]he mortgagor should not be permitted to destroy or impair the mortgagee's contractual right to foreclosure under the power of sale by the simple expeient of instituting a suit, whether groundless or meritorious, thereby compelling the mortgagee to abandon the extra-judicial foreclosure which he had the right to elect, nullifying his election, and permitting the mortgagor to control the option as to remedies.

Kaspar, 466 S.W.2d at 329; *accord Stille v. Colborn*, 740 S.W.2d 42, 44 (Tex.App.-San Antonio 1987, writ denied). The purpose of this rule is to prevent a borrower from depriving its lender of a choice of remedies.

[4] The federal counterclaim rule, Fed. R.Civ.P. 13(a), is inapplicable if it abridges, enlarges, or modifies the plaintiff's or defendant's substantive rights. Under Texas law, lenders have a substantive right to elect judicial or nonjudicial foreclosure in the event of a default, and debtors have no right to force the lender to pursue a judicial foreclosure remedy. Application of rule 13(a) in the instant case would abridge the lender's substantive rights and enlarge the debtor's substantive rights. Thus, we believe it is appropriate in this case to follow the state's practice of permitting a lender to refrain from filing a counterclaim on overdue notes and to wait to pursue either a judicial or nonjudicial foreclosure remedy.

DDI and Douglas contend that the *Kaspar* rule applies only to cases where the lender has a deed of trust, not to cases where the lender has a security agreement. We disagree. The security agreements in the instant case

provide the lender with the right to pursue a nonjudicial foreclosure on the collateral. It is true that *Kaspar* and its progeny, such as *Thurman, Phillips,* and *Stille,* involve lenders who held deeds of trust rather than security agreements; yet, we know of no reason to treat a lender's right to a nonjudicial foreclosure in a security agreement differently than a lender's right to a nonjudicial foreclosure in a deed of trust.[3]

III. CONCLUSION

We hold that FRBA was not required to assert counterclaims on the overdue notes in the Class Action and that FDIC/corp.'s instant action to collect on the notes is not barred.

AFFIRMED.

A true copy
Test
Clerk, U.S. Court of Appeals, Fifth Circuit
By_____
Deputy Feb. 16, 1993
New Orleans, Louisiana

---

[3] In his reply brief, Douglas contends that his note is not secured by a security agreement or a deed of trust and therefore, the *Kaspar* rule was never triggered. The *Kaspar* rule is intended to prevent a borrower from depriving its lender of a *choice* of remedies (nonjudicial remedies v. judicial remedies). Douglas contends that FRBA, never had a choice of a nonjudicial remedy with respect to the Douglas note. We will not address Douglas's argument because it is based on new facts not presented in the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

DOUGLAS DRILLING, INC.
and DONALD WAYNE DOUGLAS,
Plaintiffs,

v.

NCNB TEXAS NATIONAL BANK,
Defendant,

FEDERAL DEPOSIT INSURANCE CORPORATION in its Corporate Capacity,
Counterclaimant.

Civil Action No.
CA 1--91-136-C

JUDGMENT

The Court on this date has entered an order granting the Defendants' Motion for Summary Judgment. For the reasons set forth in the order, the Court renders the following judgment:

It is ORDERED, ADJUDGED, and DECREED that Plaintiffs take nothing as against Defendants, NATIONSBANK OF TEXAS, N.A., formerly know as NCNB TEXAS NATIONAL BANK, and FEDERAL DEPOSIT INSURANCE CORPORATION in its Corporate Capacity.

It is further ORDERED, ADJUDGED, and DECREED that Defendant FEDERAL DEPOSIT INSURANCE CORPORATION in its Corporate Capacity

recover judgment on its counterclaim as follows:

(a) against DOUGLAS DRILLING, INC. and DONALD WAYNE DOUGLAS, jointly and severally, the principal sum of $382,152.27; accrued interest of $175,129.71; attorney's fees of $40,700.40; post-judgment interest at the rate of 4.40 percent per annum; and costs of court;

(b) against DONALD WAYNE DOUGLAS, the principal sum of $189,463.76; accrued interest of $83,712.77; post-judgment interest at the rate of 4.40 percent per annum; and costs of court; and

(c) specific performance of security agreements:

DOUGLAS DRILLING, INC. to turn over collateral to FEDERAL DEPOSIT INSURANCE CORPORATION in its Corporate Capacity for foreclosure and sale pursuant to security agreements.

Any relief not expressly granted herein is DENIED.

The Clerk shall furnish a copy hereof to each attorney of record.

Entered this 21st day of May, 1992.

SAM R. CUMMINGS
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS ABILENE DIVISION

DOUGLAS DRILLING, INC.
and DONALD WAYNE DOUGLAS,
Plaintiffs,

v.

NCNB TEXAS NATIONAL BANK,
Defendant,

FEDERAL DEPOSIT INSURANCE CORPORATION in its Corporate Capacity,
Counterclaimant.

Civil Action No.
CA 1-91-136-C

ORDER

This case is before the court for consideration of the cross-motions for summary judgment filed by the parties.[1] The court has considered the motions, the written argument of counsel, the affidavits and exhibits filed by the parties, and the record in this case.[2] The court is of the opinion that,

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[1]On February 7, 1992, Plaintiffs filed a document entitled "Plaintiffs' Opposition to Motion for Leave to File Federal Deposit Insurance Corporation's First Amended Counterclaim." Plaintiffs requested that the court treat the response as their motion for summary judgment. The court has done so.

On February 27, 1992, in addition to filing their response to the plaintiffs' motion for summary judgment, defendants filed a motion for summary judgment.

[2]The court has not considered Mr. Black's letter dated April 30, 1992, because it is not part of the record in this case. See Rule 7(b)(1), Fed.R.Civ.P. and Rule 2.1(b), Local Rules of the Northern District of Texas.

as a matter of law, defendants are entitled to summary judgment.

Summary judgment is appropriate when the record reflects that there are no genuine issues of material fact and that movants are entitled to judgment as a matter of law. Rule 569c), Fed.R.Civ.P. The record before the court reflects that there are no disputed issues of fact. As a matter of law, defendants have established that they are entitled to judgment on the notes and the intentional infliction of emotional distress claims of plaintiffs. Plaintiffs have not controverted defendants' right to judgment on their infliction of emotional distress claims. Neither have they controverted the amount of attorneys' fees requested by FDIC. Plaintiffs only argue that, as a matter of law, the notes are void and the security agreements are unenforceable. They are not.

Under Texas law, when a borrower files an action attacking the collectibility of a secured debt, the compulsory counterclaim rule does not require the secured party to counterclaim to collect the debt *if* he has chosen to exercise his bargained for right to pursue extra-judicial foreclosure. *Thurman v. FDIC*, 889 F.2d 1441, 1444 (5th Cir. 1989). (Emphasis added.) Neither can a borrower force a lender to elect from the remedies available to it under the transaction or to waive any of its remedies by merely filing a lawsuit attacking the collectibility of the debt. See *Phillips v. FDIC (In re Phillips)*, 124 B.R. 712, 717 (Banks. W.D. Tex. 1991). If the lender has elected to pursue one of two mutually exclusive remedies or has waived one of those remedies, the rule is different. *Id.* at 718. A lender is not protected from the consequences of choices voluntarily made. *Id.* Although plaintiffs assert that FRBA and FDIC waived any rights under the security agreement because they did not attempt to obtain the collateral sooner, nothing

in the undisputed facts of this case demonstrates that FRBA, FDIC-R, NCNB, of FDIC-C ever elected or waived any remedy until NCNB demanded that plaintiffs gather the collateral for repossession. Plaintiffs attempt to distinguish this case from those cited by noting that those cases involved deeds of trust and the right to non-judicial foreclosure under them; however, there is nothing in any of the cases that would indicate that extra-judicial rights under security agreements and the UCC would be treated any differently from those in a deed of trust. The security agreements in this case provide for various options to the lender upon default: such as, the right to require the debtor to assemble the collateral and make it available to the lender; the right to reduce the claim to judgment; the right to foreclose; after notice, the right to sell, lease, or dispose of the collateral; the right to immediate possession of all books and records evidencing accounts and general intangibles, etc.

The parties argue other *res judicata* issues,; but, even if FRBA itself were still the defendant in this case instead of FDIC-C, as a matter of law, plaintiffs would not be entitled to judgment. It is not necessary to discuss the other matters raised by the parties. Therefore, plaintiffs motion for summary judgment on its claim for a declaration that the notes are void and the security agreements are unenforceable should be denied.

It is, accordingly, ordered that plaintiffs' motion for summary judgment is *DENIED*.

It is, further, ordered that defendants' motion for summary judgment is *GRANTED*.

The clerk shall furnish a copy of this order to each attorney or record.

DATED this 21st day of May, 1992.

SAM R. CUMMINGS
United States District Judge

Supreme Court, U.S.
FILED
JUL 30 1993
OFFICE OF THE CLERK

No. 92-1860

In the Supreme Court of the United States

OCTOBER TERM, 1993

DONALD WAYNE DOUGLAS AND
DOUGLAS DRILLING, INC., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
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ALFRED J.T. BYRNE
General Counsel

JACK D. SMITH
Deputy General Counsel

ANN S. DUROSS
Assistant General Counsel

RICHARD J. OSTERMAN, JR.
DANIEL H. KURTENBACH
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the right of a secured lender to pursue a nonjudicial foreclosure under Texas law is a substantive right that, under the Rules Enabling Act, 28 U.S.C. 2072(b), cannot be abridged by the Federal Rules of Civil Procedure.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1860

DONALD WAYNE DOUGLAS AND
DOUGLAS DRILLING, INC., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-11a) is reported at 979 F.2d 1128. The opinion of the district court (Pet. App. 14a-17a) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1992. A petition for rehearing was denied on February 3, 1993. Pet. App. 1a-2a. The

[1] The opinions reproduced in the appendix to the petition contain several omissions. We have reproduced corrected versions of the relevant passages (with the portions omitted from the appendix to the petition italicized) in the Addendum to this brief. See Addendum, *infra*, 1a.

petition for a writ of certiorari was filed on May 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On October 2, 1987, petitioners executed two promissory notes in favor of First RepublicBank Abilene, N.A. (FRBA). Petitioner Douglas Drilling, Inc. (DDI) secured its note by granting a security interest in personal property; petitioner Donald Wayne Douglas (Douglas) secured his note by granting a deed of trust in a mineral lease and a security interest in 1,000 shares of DDI stock. A few months later, in January 1988, petitioners defaulted on the two notes. See Pet. App. 7a.

On April 11, 1988, after the maturity date of the notes, petitioners filed a class action against FRBA in Texas state court, alleging that FRBA had calculated and charged interest in fraudulent amounts. After the case was removed to federal court, FRBA filed an answer, but did not assert counterclaims against petitioners to collect on the notes. In July 1988, the Federal Deposit Insurance Corporation was appointed receiver for FRBA. As receiver, it sold the assets of FRBA (including petitioners' notes) to NCNB Texas National Bank, now known as NationsBank of Texas, N.A. (NCNB). The class action against FRBA was continued against the Federal Deposit Insurance Corporation as receiver for FRBA. NCNB did not become a party to the class action. In March 1990, on petitioners' motion, the class action was dismissed with prejudice. See Pet. App. 8a.

2. On March 25, 1991, petitioners filed this action in Texas state court, seeking a declaratory judgment

that they were not liable on the notes. NCNB counterclaimed for recovery of the collateral. In November 1991, NCNB assigned the two notes to the Federal Deposit Insurance Corporation in its corporate capacity (FDIC), the current holder of the notes.[2] On December 13, 1991, the FDIC intervened in this action. The FDIC then removed the case to federal district court, where it sought recovery of the amounts due on the notes and an order requiring DDI to turn over the collateral. See Pet. 2-3; Pet. App. 7a-8a, 16a.

On May 21, 1992, the district court granted summary judgment in favor of the FDIC. Pet. App. 14a-17a. The court rejected petitioners' argument that NCNB and the FDIC were barred from collecting on the notes because FRBA had failed to attempt to collect on the notes as a compulsory counterclaim in the earlier class action. The court noted that under Texas law, a borrower cannot force a lender to waive its nonjudicial foreclosure remedy by filing a lawsuit arguing that the debt is uncollectable. The court reasoned that the compulsory counterclaim rule therefore did not require FRBA to elect judicial foreclosure in the earlier litigation. *Id.* at 15a-16a.

3. The court of appeals affirmed. Pet. App. 5a-11a. The court explained that once a state court action is removed to federal court, it is governed by federal procedural rules, including Fed. R. Civ. P. 13(a) (which governs compulsory counterclaims). Nevertheless, the court explained, a federal procedural rule that would "abridge, enlarge or modify any sub-

---

[2] The FDIC has advised us that the court of appeals erred in stating (Pet. App. 8a) that the notes were assigned to the FDIC in November 1990.

stantive right" would violate the Rules Enabling Act, 28 U.S.C. 2072(b), and thus could not be applied in such a case. Pet. App. 9a (citing *Hanna* v. *Plumer*, 380 U.S. 460, 470-473 (1965)). The court concluded that application of the compulsory counterclaim rule in this case would abridge the lender's substantive right under Texas law to elect the nonjudicial foreclosure remedy. It also would enlarge the debtors' substantive rights by allowing them to force the lender to pursue judicial foreclosure, a power not available to the debtors under Texas law. Pet. App. 10a. Accordingly, the court concluded that FRBA had not been required to assert counterclaims on the overdue notes in the class action and that the FDIC's present counterclaims for collection were not barred. *Id.* at 11a.

ARGUMENT

Petitioners contend (Pet. 5-20) that the court of appeals erred in concluding that Fed. R. Civ. P. 13(a) does not bar the FDIC's attempt to collect on petitioners' notes in this action. That contention does not merit review.

The Rules Enabling Act, 28 U.S.C. 2072, sets the limits within which Congress intended the rules of practice and procedure in federal courts to operate. See, *e.g.*, *Burlington Northern Railroad Co.* v. *Woods*, 480 U.S. 1, 5 (1987) (Congress's rulemaking authority originates in the Constitution and is bestowed on the Court by the Rules Enabling Act); *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 748 (1980) (even if a federal rule clearly is applicable, the rule applies only if it is within the scope of the Rules Enabling Act). One of those limits is the mandate that the rules of procedure "shall not abridge, enlarge

or modify any substantive right." 28 U.S.C. 2072(b); see *Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U.S. 22, 27 n.5 (1988) (federal rules must be measured against statutory requirement of Rules Enabling Act that they not "abridge, enlarge or modify any substantive right").

To use this Court's phrasing, application of a particular federal rule in a particular case passes muster under the Rules Enabling Act if the "rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 14 (1941); see *Hanna* v. *Plumer*, 380 U.S. 460, 464 (1965) (same). The decision of the court of appeals in this case is nothing more than an application of that test to a particular factual situation. Given the determination of the lower courts that Texas law granted respondent the capacity to control the means by which it would collect on its debt—and thus would not have required respondent to assert a claim to collect on that debt as a compulsory counterclaim in state court—it was entirely reasonable for those courts to conclude that application of Fed. R. Civ. P. 13(a) to deprive respondent of that capacity would transgress the bounds of the Rules Enabling Act. Notwithstanding petitioners' high-blown rhetoric, nothing in that analysis limits the "uniform system of practice and procedure" in the federal courts. Pet. 7. The court of appeals simply concluded that application of Rule 13(a) in this case would go beyond matters of procedure into matters of substance, which the Federal Rules do not govern.

Petitioners err in asserting (Pet. 7-17) that the decision of the court of appeals conflicts with numerous decisions of this Court and other courts of appeals. None of the decisions on which petitioners rely considers whether Fed. R. Civ. P. 13(a) properly can abridge rights like the right to foreclose at issue in this case. The three appellate decisions that consider the applicability of Rule 13 in federal court involved situations in which a state rule absolutely barred a party from presenting a counterclaim in a particular proceeding and thus required related claims to be pursued separately. The question was whether the federal court nevertheless should permit joinder of such a counterclaim.[3] Accordingly, none of those courts had any occasion to address the logically distinct problem at issue here—whether a party's capacity under state law to withhold a claim and pursue instead a *nonjudicial* remedy is a substantive right not to be infringed by a federal rule requiring presentation of certain counterclaims in a pending proceeding.

Finally, petitioners argue (Pet. 18-20) that the lower courts erred in interpreting Texas law.

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[3] See *Doelle* v. *Mountain States Telephone & Telegraph*, 872 F.2d 942, 944-946 (10th Cir. 1989) (federal rules allow a counterclaim for condemnation in trespass action in federal court even if the counterclaim would be barred under state procedures); *TPO Incorporated* v. *FDIC*, 487 F.2d 131, 133-134 (3d Cir. 1973) (although special state proceeding restricted filing of counterclaims, that restriction is inapplicable in federal court); *Tolson* v. *Hodge*, 411 F.2d 123, 127-129 (4th Cir. 1969) (administrator of the estate of a deceased nonresident driver can assert a counterclaim under the federal rules notwithstanding state rules that deny him the capacity to sue in state proceeding).

Petitioner claims that the decision of the Texas Supreme Court in *Barr* v. *RTC*, 837 S.W.2d 627 (1992), has overruled the decision on which the lower courts relied, *Kaspar* v. *Keller*, 466 S.W.2d 326 (Tex. Civ. App. Waco 1971) (writ ref'd n.r.e.). At the threshold, there exists no basis for supposing that the lower courts' evaluation of Texas law presents any question worthy of review by this Court. Compare *Bishop* v. *Wood*, 426 U.S. 341, 345-346 (1976). In any event, nothing in *Barr* suggests that the Texas Supreme Court intended to reject the rule adopted in *Kaspar* and subsequent cases that followed *Kaspar*.[4] *Barr* does not mention *Kaspar* itself and does not address the situation presented in *Kaspar*. Rather, *Barr* involves a case in which a lender brought two lawsuits to collect on a loan. The Texas Supreme Court held that a judgment in favor of the borrower in one of the suits was res judicata as to claims against the borrower in the second suit arising out of the same transaction. 837 S.W.2d at 631. That analysis would have no application here, because respondent has brought a claim for collection only once, in this action.

To be sure, the court in *Barr* did suggest that its "transactional" approach to res judicata resembled the compulsory counterclaim rule, 837 S.W.2d at 630, but the case did not involve, and the court did not address, the possibility that application of the com-

[4] See *Stille* v. *Colborn*, 740 S.W.2d 42, 44 (Tex. Ct. App. San Antonio 1987) (writ denied); *Thurman* v. *FDIC*, 889 F.2d 1441, 1444-1445 (5th Cir. 1989); *Phillips* v. *FDIC* (*In re Phillips*), 124 B.R. 712, 717-718 (Bankr. W.D. Tex. 1991); see also *Belote* v. *McLaughlin*, 673 S.W.2d 27, 30 (Mo. 1984) (following *Kaspar* to adopt same rule under Missouri law).

pulsory counterclaim rule would modify the substantive right of a lender to elect between judicial and nonjudicial foreclosure. Petitioners' argument—that the Texas Supreme Court's adoption of a res judicata rule that parallels the compulsory counterclaim rule implicitly invalidates an exception to the compulsory counterclaim rule—is insufficient to justify review by this Court of the lower courts' interpretation of Texas law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1993

ADDENDUM

1. The second sentence of the second paragraph on Pet. App. 7a should read as follows:

> DDI and Douglas contend that FDIC/corp. cannot collect on the notes because First RepublicBank Abilene, N.A. (FRBA), a prior holder of the notes, lost its right to collect on the *notes by failing to counterclaim to collect on the* overdue notes in prior litigation.

2. The second sentence of the paragraph carrying over from Pet. App. 8a to Pet. App. 9a should read as follows:

> Fed.R.Civ.P. 13(a) provides that a counterclaim is compulsory if it arises out of the transaction or occurrence that is the subject matter of the plaintiff's *claim. Under rule 13(a), FRBA's debt* collection claims against DDI and Douglas might very well constitute compulsory counterclaims.

3. The penultimate sentence of the first full paragraph on Pet. App. 15a should read as follows:

> Neither have they controverted the *amounts due on the notes, the interest rate to be applied, or the* amount of attorneys' fees requested by FDIC.

NO. 92-1860

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DONALD WAYNE DOUGLAS AND
DOUGLAS DRILLING, INC., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION, NATIONSBANK OF TEXAS, N.A.

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the right of a secured lender to pursue a non-judicial foreclosure under Texas law is a substantive right that, under the Rules Enabling Act, 28 U.S.C. 2072(b), cannot be abridged by the Federal Rules of Civil Procedure.

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BRIEF FOR THE RESPONDENT IN OPPOSITION, NATIONSBANK OF TEXAS, N.A.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-11a) is reported at 979 F.2d 1128. The opinion of the district court (Pet. App. 14a-17a) is unreported.[1]

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[1] The opinions reproduced in the appendix to the petition contain several omissions. As did the FDIC, this respondent has reproduced corrected versions of the relevant passages (with the portions omitted from the appendix to the petition italicized)

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1992. A petition for rehearing was denied on February 3, 1993. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on May 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 2, 1987, Douglas Drilling, Inc. ("DDI") and Donald Wayne Douglas ("Douglas") each executed a promissory note in favor of First Republic Bank Abilene, N.A. ("FRBA"). The DDI note was secured by a security interest in oil and gas equipment and a deed of trust in an interest in oil and gas property. The Douglas note was secured by a deed of trust in an interest in oil and gas property and a security interest in stock of DDI. Douglas guaranteed the payment of the DDI note.

In early 1988, DDI and Douglas defaulted on the notes. Thereafter, on April 11, 1988, after the maturity of the notes, petitioners filed a class action against FRBA and others on the basis of prime rate fraud. The case was removed to federal court to be consolidated with two other similar actions against the same parties. FRBA filed an answer but did not assert any counterclaims on the notes.

On July 29, 1988, FRBA failed, and the Federal Deposit Insurance Corporation ("FDIC") was

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in the Addendum to this Brief. See Addendum, *infra*, 1a.

appointed as Receiver. On the same date, through a purchase and assumption transaction, FDIC, as Receiver, assigned certain FRBA assets (including the Douglas and DDI notes) to NCNB Texas National Bank, now known as NationsBank of Texas, N.A. ("NCNB"). Thereafter, an attempt was made by petitioners to join NCNB as a defendant in the class action. The attempt failed, and NCNB was never made a party to the class action.

FDIC, as Receiver, retained the liabilities of FRBA with respect to the claims of the petitioners in the class action, and remained a party to the class action, which was abated until 1990. In March 1990, on petitioners' motion for dismissal, petitioners' complaint in the class action was dismissed with prejudice. See Pet. App. 8a.

NCNB later made demand upon DDI to turn over the collateral to NCNB. In response to such demand, the petitioners filed this action in Texas state court on March 25, 1991, seeking declaratory judgment that they were not liable on the notes, and also asserted claims for intentional infliction of emotional distress and malice against NCNB for seeking enforcement of the security agreements. NCNB counterclaimed for recovery of the collateral.

In November 1991, NCNB assigned the two notes to the FDIC, in its corporate capacity, the current holder of the notes. On December 13, 1991, FDIC intervened in the action, and removed the case to federal district court. After removal, FDIC sought recovery of the amounts due on the notes and an order requiring DDI to turn over the collateral. See Pet. App. 2-3; Pet. App. 7a-8a, 16a.

On May 21, 1992, summary judgment was entered that the petitioners take nothing against NCNB and FDIC and that FDIC recover the amounts due on the notes and for specific performance of the security agreements. See Pet. App. 12a-13a. The district court rejected the petitioners' claims that NCNB and FDIC were barred from collecting on the notes because FRBA had failed to seek collection of the notes as a compulsory counterclaim in the class action. The district court noted that in Texas a borrower could not force the lender to waive its non-judicial foreclosure remedy by filing a lawsuit and arguing that the debt was uncollectible. See Pet. App. 15a.

The court of appeals affirmed this decision. See Pet. App. 5a-11a. The court held that Fed. R. Civ. P. 13(a), governing compulsory counterclaims, could not "abridge, enlarge or modify any substantive right," as such would violate the Rules Enabling Act. 28 U.S.C. 2072(b). See Pet. App. 9a. The court concluded that application of the compulsory counterclaim rule would abridge the lender's substantive right under Texas law to elect non-judicial foreclosure, and would enlarge the debtor's substantive rights by allowing them to force the lender to pursue judicial foreclosure. Accordingly, the court concluded that FRBA had not been required to assert counterclaims in the class action, and that the FDIC's actions on the notes were not barred. *Id.* at 11a.

ARGUMENT

The petitioners have not urged any error with respect to the denial of relief that they sought against NCNB in the trial court. The sole issue presented,

therefore, is whether Fed. R. Civ. P. 13(a) barred the FDIC's rights to collect on the notes.

In that regard, NCNB here adopts and incorporates, as if set forth herein, the brief for the Respondent in Opposition, the FDIC, and would join the FDIC in urging that the petition should be denied for the following reasons:

1. The federal rules of procedure are not to "abridge, enlarge or modify any substantive right." 28 U.S.C. 2072(b); see *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 n.5 (1988). The lower courts correctly determined that Texas law had granted to a noteholder a substantive right to control its remedies for collection of the debt, and that application of Rule 13(a) would deprive the noteholder of this substantive right.

To apply Rule 13(a) as requested by petitioners would not result in a regulation of procedure - i.e., "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). It would, in fact, destroy a private, bargained-for contractual right, and in its place allow the party who defaulted on the contract to control the means of redress for disregard of such contract.

2. No conflict exists with decisions of this Court or the court of appeals. Although numerous decisions are cited by petitioners, they are cited solely for their statements concerning public policy, the prevention of duplicitous lawsuits, and conclusiveness of judgments. No decision cited

considers whether Rule 13(a) would abridge a substantive right of a party, such as the selection of foreclosure remedies.

3. The Texas Supreme Court opinion of *Barr v. RTC*, 837 S.W.2d 627 (Tex. 1992) does not abrogate the *Kaspar* rule.[2] *Barr* merely adopted the transactional approach to *res judicata*, and held that dual attempts by a lender to collect the same note wou'd be barred. *Id.* at 631. The court did not consider, nor did it address, the *Kaspar* rule or whether its ruling would be permitted to modify substantive rights of lenders to elect between judicial and nonjudicial foreclosure.[3] No such ruling can be inferred in the court's opinion, nor is such argument sufficient to justify review by this Court. See *Bishop v. Wood*, 426 U.S. 341, 345-346 (1976).

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[2] The rule relied upon by the lower courts in this case is found in *Kaspar v. Keller*, 466 S.W.2d 326, 329 (Tex. Civ. App. - Waco 1971, writ ref'd n.r.e.). The *Kaspar* rule was adopted in *Stille v. Colborn*, 740 S.W.2d 42, 44 (Tex. App. - San Antonio 1987, writ denied); *Thurman v. FDIC*, 889 F.2d 1441, 1444-1445 (5th Cir. 1989); and *Phillips v. FDIC (In re Phillips)*, 124 B.R. 712, 717-718 (Bankr. W.D. Tex. 1991).

[3] Texas rules enabling statute, TEX. GOVERNMENT CODE ANN. § 22.004 (Vernon 1988), was not considered in *Barr*. It states that the rules cannot abridge, enlarge or modify the substantive rights of a litigant. *See also* Tex. R. Civ. P. 814 (relied upon by the court in *Kaspar*, 466 S.W.2d at 392).

In addition to the above, NCNB, as the owner and holder of the notes, was never a party to the proceeding which was dismissed with prejudice, even though an attempt was made by petitioners to join it. As a consequence, *res judicata* would not apply to NCNB or its assignee, FDIC. *See Martin v. Wilks*, 490 U.S. 755, 761 (1989) (no one will be bound by a judgment in which he is "not designated as a party or to which he has not been made a party by service of process").[4]

As a result of the lower courts' action being in all things proper, the attempts to collect on the notes were lawful, and no claims urged by the petitioners against NCNB could be maintained.

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[4] Nor does the privity rule apply in these circumstances. No prior judgment existed against FRBA at the time of the transfer of the notes to NCNB by the FDIC, as Receiver; NCNB did not "control" the class action or the FDIC, as Receiver, during the course of the class action; and NCNB's interests as the owner of the notes were not adequately represented by the FDIC, as Receiver, who only retained the liabilities arising out of the class action. See *Benson & Ford v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174 (5th Cir. 1987) (describing the three circumstances where privity will apply); *Thurman*, 889 F.2d at 1446 (FSLIC, as receiver, was held not to be a virtual representative of FSLIC, in its corporate capacity); *Pernie Bailey v. FDIC*, 905 F.2d 79, 80 (5th Cir. 1990) (Receiver retains liabilities).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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